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No. 513

In the Supreme Court of the United States

OCTOBER TERM, 1951

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

MEMORANDUM FOR THE UNITED STATES

INDEX

CITATIONS

Cases:	Page
Great Northern Railway Company v. *United States*, 81 F. Supp. 921, affirmed, 336 U. S. 933	10
New York v. *United States*, 331 U. S. 284	5
Pennsylvania R. Co. v. *United States*, 54 F. Supp. 381, affirmed, 323 U. S. 588	7
St. Louis Southwestern Railway Company v. *United States*, 245 U. S. 136	9
Securities and Exchange Commission v. *Chenery Corp.*, 318 U. S. 80	13
Through Routes and Through Rates, 12 I. C. C. 163	9, 10
Virginian Ry. v. *United States*, 272 U. S. 658	12
Western Pacific R. Co. v. *Northwestern Pacific R. Co.*, 191 I. C. C. 127	8
Statute:	
Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1, *et seq.*:	
Sec. 1 (4)	5, 6, 8
Sec. 3 (1)	5
Sec. 3 (4)	6, 8, 11
Sec. 6 (1)	11
Sec. 15 (1)	5
Sec. 15 (3)	6, 7, 8
Sec. 15 (4)	6, 7, 8
Miscellaneous:	
Brief of United States and Interstate Commerce Commission in *United States et al.* v. *Great Northern Railway Company*, No. 151, this Term	7

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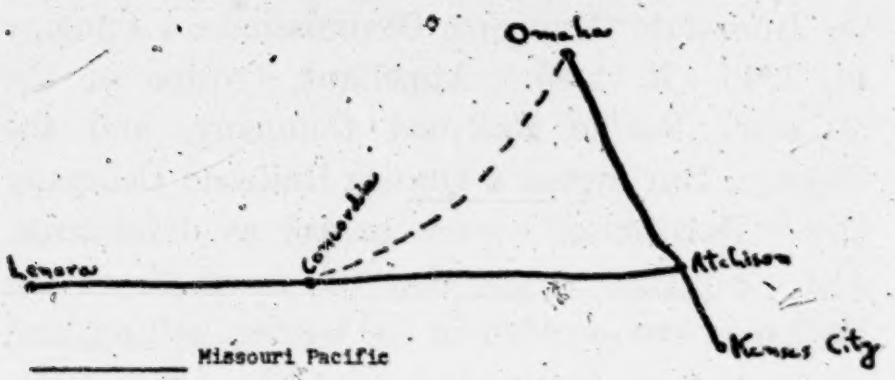
MEMORANDUM FOR THE UNITED STATES

The proceeding out of which this case arises was instituted by the complaint of the Omaha Grain Exchange of Omaha, Nebraska, filed with the Interstate Commerce Commission on January 14, 1946 (R. 1–3). Appellant, trustee of the Missouri Pacific Railroad Company, and the Chicago, Burlington & Quincy Railroad Company (the "Burlington") were named as defendants. The complaint alleges that the members of the Exchange are engaged in the buying, selling, and processing of grain, and that the grain rates

charged by the Missouri Pacific and the Burlington for the transportation of grain from Central Kansas origin points to the Omaha market are unjust, unreasonable, and discriminatory, in violation of Sections 1 and 3 of the Interstate Commerce Act. It was also alleged that a route via the Missouri Pacific to Concordia, Kansas, and then via the Burlington to Omaha is a practicable through route for Central Kansas-Omaha shipments. The complaint prayed that the carriers be required to desist from their violations of the Act and that the Commission establish just and reasonable rates.

After full administrative hearings and proceedings, the Commission, on July 10, 1950, entered its final order (R. 170–171) requiring that the two carriers maintain and apply grain rates over the route specified in the complaint which would not exceed the rates on like traffic moving from Central Kansas origins to Kansas City, Missouri.

The material rail and geographic locations may be most readily indicated by a sketch.



In the above diagram, Lenora, Kansas, serves as a typical origin point. The distance from Lenora to Kansas City is 341 miles and the prevailing grain rate is 19 cents per cwt. From Lenora to Omaha, via the line of the Missouri Pacific, is 449.5 miles, and the Missouri Pacific's grain rate between those points is 25.5 cents. From Lenora to Omaha, via the Missouri Pacific-Burlington route, is only 336 miles. One shipping grain over that route, however would have to pay a combination of local rates amounting to 30 cents. See R. 165–166, 173–174.

Omaha and Kansas City are rival primary grain markets and competition between them is keen. See R. 13, 17, 19, 176. Indeed, competition in the grain and grain products trade is so sharp that, at times, a difference of only one-half cent per barrel of flour (200 pounds) has been sufficient to divert sales (R. 176). Indisputably, the effect of the disparity in freight rates as between Central Kansas-Kansas City traffic and Central Kansas-Omaha traffic has been to deny to Omaha dealers the economic opportunity of drawing upon Central Kansas grain sources (*ibid.*). The Commission concluded that "it is clear that the assailed combination through rate of 30 cents from Lenora to Omaha, for example, over the Missouri Pacific-Burlington route through Concordia, is unreasonable as compared with a rate of 19 cents from Lenora to Kansas City for a haul of 5 miles longer than to Omaha" (R. 169).

Appellant attacked the validity of the Commission's final order by a proceeding instituted before a specially constituted three-judge court in the Eastern District of Missouri. The United States and the Interstate Commerce Commission defended the order and the court sustained it (one judge dissenting). The opinion (R. 242–249) points out that the Commission's order rests on the premise that a through route was already in existence between Central Kansas origin points and Omaha via the rails of the Missouri Pacific and the Burlington. The court held that the finding of the Commission on this point was reasonable, stating (R. 248):

> * * * evidence of physical interchange connection at Concordia, plus long established joint rates to some points on the Burlington short of Omaha, plus combination rates to Omaha, furnish sufficient evidentiary basis for the conclusion of the Commission of the existence of a through route and its order for reasonable rates over that route.

DISCUSSION

Appellee United States does not attempt in this memorandum to discuss in full detail the evidence of record which bears upon the Commission's finding concerning the existence of a through route. That task has been undertaken by the Commission which has filed a separate brief. Re-examination of the case in the light of ap-

pellant's brief to this Court convinces this appellee that the correctness of the Commission's conclusion turns not so much upon matters of evidence, concerning which there is relatively little room for dispute, as it does upon the legal content which is to be given the term "through route" as it is used in the regulatory statute. We shall accordingly attempt to set forth our understanding of the applicable legal criteria. We shall also attempt to indicate what we believe would be an appropriate disposition of this case in the event that the Court should conclude that these criteria have not been fully satisfied.

1. The pivotal question is whether a through route existed at the time the Commission entered its order. Where a through route exists, there is, of course, no question of the Commission's plenary authority to require a reasonable and non-discriminatory through rate. See Interstate Commerce Act, Sections 1 (4), 3 (1), 15 (1); *New York* v. *United States*, 331 U. S. 284. Appellant has stated (Br., p. 19):

> If through routes existed from the Kansas origins involved to Omaha over the Missouri Pacific and Burlington through Concordia, the appellant would not dispute the right of the Commission to prescribe through rates * * *.

As appellant points out, however, connecting carriers are not subject to the duty of forming through routes in any and all circumstances.

Section 1 (4) of the Act states that "It shall be the duty of every common carrier * * * to establish *reasonable* through routes with other such carriers * * *" [italics added]. Carriers are also required to afford reasonable facilities "for the interchange of traffic" with connecting lines and "for the receiving, forwarding, and delivering" of traffic to those lines. Section 3 (4). That, however, as we shall indicate more fully below, falls short of a duty to join in a through route.

The Commission's power to *prescribe* a through route (and likewise joint rates applicable thereto)[1] is also limited by the statute, specifically by Sections 15 (3) and (4). Section 15 (3) empowers the Commission to prescribe through routes and joint rates, either upon complaint or upon its own initiative, but only when that is found "to be necessary or desirable in the public interest." Section 15 (4), generally known as the short-haul provision, contains a further limitation. When the prescription of a new route will compel one of the participating carriers "to embrace in such route substantially less than the entire length of its railroad * * * between the termini of such proposed through route," the Commission must make an additional finding. It must determine either that that carrier should

[1] Clearly, the significant aspect of the power to prescribe a new through route is the concomitant power to prescribe a rate which will move traffic over that route.

be deprived of its long-haul because the existing route is unreasonably long *or* that the proposed route is needed to provide adequate and more efficient or economic transportation.[2]

The Commission held (R. 167–8) that Sections 15 (3) and (4) were inapplicable in the present case because a through route already existed. If it was correct in its premise, the order should stand, for appellant has made no showing that the prescribed through rate is unreasonable.

If, however, the premise was erroneous, we think it must be conceded that the order is presently, though not necessarily incurably, defective. Assuming, *arguendo,* that the Commission was prescribing a through route where none theretofore existed, it would appear that the conditions of Sections 15 (3) and (4) were not satisfied by the findings. The Commission did not find that the establishment of a route including the Burlington was necessary or desirable in the public interest. And it did not make the requisite findings under Section 15 (4), although it appears that a route which includes the Burlington's rails requires the Missouri Pacific to

[2] For a discussion of the history and application of the Act's short-haul provision, see *Pennsylvania R. Co.* v. *United States*, 54 F. Supp. 381, 385–8 (D. Md.), cited with approval in the affirming opinion of this Court, 323 U. S. 588, 591–3. See, also, the brief of the United States and the Interstate Commerce Commission in *United States et al.* v. *Great Northern Railway Company*, No. 151, this Term, p. 31 *et seq.*

utilize substantially less than its entire trackage between Central Kansas origins and Omaha.[3]

The sections of the statute to which we have referred indicate this much at the least. Connecting facilities and provision for interchange of traffic do not necessarily establish the existence of a through route.[4] Thus, while connecting carriers are required in all cases to provide reasonable facilities for interchanging and forwarding freight (Section 3 (4)), they are required only to establish "reasonable" through routes (Section 1 (4)). And the Commission's power to prescribe through routes over connecting lines is circumscribed by various conditions (Sections 15 (3), (4)).

Since rail lines which physically connect and over which the carriers are obligated to provide service by means of interchange do not neces-

[3] We do not wish to imply that there was no evidence in the record which would have justified the findings required by 15 (3) and (4) had the Commission seen fit to make them.

[4] In *Western Pacific R. Co.* v. *Northwestern Pacific R. Co.*, 191 I. C. C. 127, 130–131, the Commission stated the proposition as follows:

"Connecting routes do not necessarily constitute through routes over which carriers may be forced to establish joint rates. The rights of connecting carriers afforded by the act must be safeguarded, and in addition the necessity and desirability for the establishment of such through routes must be in the public interest."

And the district court declared in this case (R. 246) that, although "the first requisite to a through route is a physical connection," that "alone does not necessarily mean a through route exists."

sarily constitute through routes, the question remains—What is the touchstone by which one determines when a through route has been established?

In *St. Louis Southwestern Railway Company v. United States*, 245 U. S. 136, 139, this Court referring to *Through Routes and Through Rates*, 12 I. C. C. 163, 166, declared:

> A "through route" is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a "through rate." This "through rate" is not necessarily a "joint rate." It may be merely an aggregation of separate rates fixed independently by the several carriers forming the "through route"; as where the "through rate" is "the sum of the locals" on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation.

The Commission's decision to which the Court referred states further (12 I. C. C. at 166–7):

> In answering the question of fact as to the existence of a through route, all the incidents and circumstances of the shipment must be taken into account. * * *
>
> * * * such incidents as the billing, the transfer from one carrier to another,

> the collection and division of transportation charges, * * * and other like incidents * * * may properly be depended upon for guidance as to the existence of a through route.[5]

The Commission also declared in that case (p. 167) that, "whatever other facts or incidents of a shipment may serve to prove the existence of a through route, a through bill of lading is, as to the carriers recognizing it, conclusive evidence of the existence of such through route."

Since there is no evidence in the present case that through bills were or would be issued by the Missouri Pacific for shipments via the Burlington to Omaha, it must be determined whether the "other facts or incidents" warrant the Commission's inference that a route had been established. As in cases, not infrequently perplexing, involving the question whether two parties, by their conduct, shall be deemed to have entered into a relationship of agency, so here, also, it becomes necessary to decide whether, in the light of all the circumstances, there has been a "'holding out" by the parties sufficient to justify the attachment of new legal consequences.

Appellant contends that the factors relied upon by the district court were not compelling but were, indeed, perfectly compatible with the conclusion

[5] A statement to the same general effect appears in *Great Northern Railway Company* v. *United States*, 81 F. Supp. 921, 924 (D. Del.), affirmed, 336 U. S. 933.

that no through route existed. We have already touched upon its argument that the existence of physical connections and interchange facilities cannot be deemed decisive.

For much the same reasons, appellant suggests that the district court erred in placing reliance upon the admitted fact that a shipper might have sent grain to Omaha via the Missouri Pacific-Burlington route by paying a combination of the local rates. Since carriers are obliged to publish their local rates (Section 6 (1)) and are also required to interchange and forward traffic (Section 3 (4)), the admission, it is argued, really admits nothing.

It is also admitted that the Missouri Pacific ships various commodities at through rates to points on the Burlington short of Omaha. (See R. 247; Appellant's Brief, pp. 15–16.) Since the two carriers form a through route to destination points in the environs of Omaha (though short of that city) and since it is admittedly possible to forward freight over the connecting lines the entire distance to Omaha (though at an unfavorable rate), it seems but a short step to say that the two lines should be deemed to form a through route to Omaha. This is not without practical appeal. When a shipment is destined to a point just short of Omaha, the Missouri Pacific apparently recognizes that the reasonable through route is via the Burlington from the junction at

Concordia, rather than over the Missouri Pacific to Omaha and then back from that point along the Burlington. And if the reasonable route to points just short of Omaha is via the Burlington from Concordia, it seems reasonable to suppose that the Burlington offers a practicable route to Omaha. This conviction is strengthened by the fact that the Missouri Pacific's rates to Omaha are substantially higher than that railroad's rates to Kansas City—presumably because the distance is greater—whereas utilization of the Missouri Pacific-Burlington route to Omaha would make the distances from Central Kansas points to Omaha shorter than the distances from those origins to Kansas City.

Nonetheless, to take the last short step is to encounter statutory difficulties. The carrier's privilege of preserving its long haul is safeguarded by the Interstate Commerce Act. Of course, it can abandon the privilege by voluntary act, or lose it as a result of Commission action taken pursuant to Section 15. But appellant insists that it cannot be held, as a matter of law, to have given up its right to serve Omaha via its own lines, by virtue of having participated in a through route via Concordia to points on the Burlington's line short of Omaha. We are constrained to agree with this position.[6]

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[6] In *Virginian Ry.* v. *United States*, 272 U. S. 658, there was no question that through rates were available to mines

2. If the Court should conclude that the circumstances did not warrant the Commission's inference that a through route already existed, it is suggested that it would be appropriate to remand the matter to the Commission for further proceedings. Assuming, *arguendo*, that the Commission was wrong in its premise that a through route existed, the Commission should now have the opportunity to determine whether the circumstances warrant prescription of the route in question for the future.[7] Cf. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80. While it would be footless to argue, in the absence of supplementary action by the Commission, that the evidence of record demands the prescription of the route, it is appropriate, we think, to point out that such action by the Commission may be vital to the public interest and may well constitute the only effective means by which the Commission can bring adequate and economic transportation to persons who, until now, have suffered under serious disabilities.

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similarly situated to complainants'. Here, that kind of discrimination does not appear, and there is no showing of a through route commercially open to any commodity from Lenora all the way to Omaha on the Missouri Pacific-Burlington line via Concordia.

[7] The complaint of the Omaha Grain Exchange sought general relief (R. 2–3). Moreover, the Commission, acting upon its own initiative, is authorized to establish through routes and through rates (Section 15 (3)).

Respectfully submitted.

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